Supreme Court, U.S.
FILED
APR 29 2010
OFFICE OF THE CLERK

No. 09-1176

IN THE
Supreme Court of the United States

PIRATE INVESTOR LLC AND FRANK PORTER STANSBERRY,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND MEDIA ORGANIZATIONS IN SUPPORT OF PETITIONERS

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, Va. 22209
(703) 807-2100
ldalglish@rcfp.org

(Additional counsel for amici *listed on inside cover.)*

Additional counsel for *amici*:

Kevin M. Goldberg
Fletcher Heald & Hildreth
1300 N. 17th St. 11th Floor
Arlington, VA 22209
Counsel for The American Society of News Editors

David H. Tomlin
Associate General Counsel
The Associated Press
450 W. 33rd St.
New York, NY 10001
Counsel for The Associated Press

Jonathan Bloom
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
Counsel for The Association of American Publishers, Inc. ("AAP")

Kathleen A. Kirby
Wiley Rein LLP
1776 K Street NW
Washington, DC 20006
Counsel for The Radio Television Digital News Association

Robert M. O'Neil
The Thomas Jefferson Center for the Protection of Free Expression
400 Worrell Drive
Charlottesville, VA 22911

TABLE OF CONTENTS

Table of Authorities iii

Statement of Interest 1

Summary of Argument 4

Argument 7

I. The decision below applying § 10(b) to a publisher of general financial recommendations with no First Amendment safeguards will impermissibly chill valuable speech regarding financial issues 7

A. Financial reporting has long been a cornerstone of journalism, informing the public and interpreting economic information on its behalf 8

II. Regardless of connection to current affairs, the First Amendment fully protects financial and economic advice 13

III. The Fourth Circuit should have conducted an independent appellate review because of the instant case's First Amendment implications 16

A. Restrictions on speech are presumptively invalid and any such restriction must be narrowly construed 16

B. The First Amendment requires a heightened evidentiary showing that a communication, always presumed to be protected, should be stripped of that protection 18

C. This Court should clarify the importance of First Amendment deference and elucidate that restrictions on speech should be narrowly construed 19

IV. The application of § 10(b) to publishers violates the First Amendment because it will have substantial effects on newsgathering 20

Conclusion 23

TABLE OF AUTHORITIES

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 13

Bose Corp. v. Consumers Union of United States,
466 U. S. 485 (1984) 16, 18, 19

Cantwell v. Connecticut,
310 U.S. 296 (1940) 17

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991) 20, 21, 22

Daniel v. Dow Jones & Co.,
520 N.Y.S.2d 334
(N.Y. Civ. Ct. 1987) 12, 15, 18

Food Lion Inc. v. Capital Cities/ABC,
194 F.3d 505 (4th Cir. 1999) 21

Ginsburg v. Agora, Inc.,
915 F. Supp. 733, 740 (D. Md. 1995) 14

Houston v. Hill,
482 U.S. 51 (1987) 17

Lowe v. SEC,
472 U.S. 181 (1985) 14, 17, 21

Lubin v. Agora,
882 A.2d 333 (Md. 2005) 14

New York Times v. Sullivan,
376 U.S. 254 (1964) 16, 18

Reynolds v. Murphy,
188 S.W.3d 252 (Tex. App. 2006) 15

NAACP v. Button,
371 U.S. 415 (1963)..... 16

Nat'l Life Ins. Co. v. Phillips Pub'g,
793 F. Supp. 627 (D. Md. 1992)..... 18

Org. for a Better Austin v. Keefe,
402 U.S. 415 (1971)..... 14

Reliance Ins. Co. v. Barron's,
442 F. Supp. 1341 (S.D.N.Y. 1977)..... 21

SEC v. Pirate Investor,
580 F. 3d 233 (4th Cir. 2009)..... 12, 19

Speiser v. Randall,
357 U.S. 513 (1958)..... 17

Sup't of Ins. v. Bankers Life & Cas. Co,
404 U.S. 6 (1971)..... 19

Thomas v. Collins,
323 U.S. 516 (1945)..... 14

Thornhill v. Alabama,
310 U.S. 88 (1940)..... 13

Time, Inc. v. Hill,
385 U.S. 374 (1967)..... 18

United States v. Stevens,
No. 08-769, 130 S. Ct. ____ (April 20. 2010) 8

STATUTES AND REGULATIONS

U.S. Supreme Court Rule 37 1

Securities Exchange Act of 1934 § 10(b) (codified at 15 U.S.C. 78j(b)) ..... *passim*

OTHER

Edward Chancellor, *Ponzi Nation*, INSTITUTIONAL INVESTOR, Feb. 7, 2007 10

Joint Appendix 4, 15

John D. McKinnon and Randall Smith, *Greenspan on Capitol Hot Seat*, THE WALL STREET JOURNAL, April 8, 2010 at A4 7

Katharine Q. Seelye and James Barron, *Wall Street Journal Wins 2 Pulitzer Prizes*, N.Y. TIMES, April 17, 2007 at B8 11

Letter from Thomas Jefferson to Edward Carrington, Delegate to the Continental Congress (Jan. 16, 1787) 17

Pet. Cert. 5, 12

Press Release, Long Island Univ., Long Island University Announces Winners of 2007 George Polk Awards (Feb. 19, 2008) 10

Press Release, Long Island Univ., Long Island University Announces Winners of 2001 George Polk Awards (Feb. 20, 2002) 11

Press Release, The New York State Society of CPAs, Journalists Receive Awards from NYSSCPA for Financial Reporting (March 31, 2009) 11

Two Important Receiverships Cause Depression, N.Y. TIMES, January 2, 1894, at 10 8

Wall St. Cheered By Bankers' Views, N.Y. TIMES, January 18, 1931, at 41 8

STATEMENT OF INTEREST[1]

Amici curiae represent individual and institutional members of the press.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

With some 600 members, ASNE is an organization that includes directing editors of daily newspapers throughout the Americas. ASNE changed its name in April 2009 to the American Society of News Editors and approved broadening its membership to editors of online news providers and academic leaders. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's

---

[1] Pursuant to Sup. Ct. R. 37, counsel for the *amici curiae* declare that they authored this brief in total with no assistance from the parties; that no individuals or organizations other than the *amici* made a monetary contribution to the preparation and submission of this brief; and that written consent of all parties to the filing of the brief *amici curiae* has been filed with the Clerk.

members include approximately 1,500 daily newspapers and 25,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

The Association of American Publishers, Inc. ("AAP") is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment.

The Radio Television Digital News Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan or-

ganization located in Charlottesville, Virginia. Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center pursues that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

Amici view the Fourth Circuit's decision in this case as a significant threat to the free dissemination of news about the financial markets and specific investment opportunities. *Amici* fear that, if this Court does not reverse the decision below, some financial news organizations will be permitted to publish freely and others will not. This would be contrary to the spirit of our system of a free and independent press. The Fourth Circuit ruling approves censorship in the form of finding a statement fraudulent without the appropriate level of First Amendment deference or independent appellate review. The opinion below essentially grants the courts the power, denied to them by the Constitution, to potentially discriminate between publications.

Amici believe, on the contrary, that the First Amendment permits any person freely to publish information about any aspect of the social, economic, or political life of our country, including financial trends, stock market predictions, and securities recommendations. Furthermore, the First Amendment precludes subsequent punishment of untruthful information without the application of a heightened evidentiary standard. Accordingly, *amici* submit this brief in support of Petitioners.

SUMMARY OF ARGUMENT

This Court should grant Petitioners' request for certiorari to articulate the proper First Amendment standard when dealing with claims of fraud under § 10(b) of the Securities exchange act of 1934. The application of § 10(b) to non-fiduciary publishers who do not trade or own shares uniquely impinges upon the constitutional rights of journalists and the public. It has the potential of permitting viewpoint discrimination[2] and unequal application to different publishers, and may in the future be used by subjects who disapprove of certain editorial content to circumvent "actual malice" protections required in libel and other actions.

This Court should clarify that if § 10(b) is properly applied to non-fiduciary publishers who do not trade or own shares; deference to the First Amendment should be strictly maintained. The Fourth Circuit erred in denying independent appellate review of the findings of fact as is required in First Amendment cases as a safeguard against forbidden intrusions into free expression.

As all speech is presumed to be protected by the First Amendment, these standards should be strictly

---

[2] In fact, counsel for the Securities and Exchange Commission in the U.S. District Court trial said that while the Commission would not hesitate to apply § 10(b) to *The Wall Street Journal*, it may not pursue action against a general publication like *The Baltimore Sun*, because "[y]ou buy the *Sun* with no particular -- you don't buy it to read the investment column ... [t]hat is not why it is published." Joint Appendix at 1447.

enforced so that courts may not give short shrift to the Constitution by simply labeling speech as fraud without an appropriate First Amendment analysis.

Taken out of the context of generalized financial advice, the standards applied by the Fourth Circuit have the potential to go well beyond Petitioners to affect all reporting on financial issues, particularly regarding stocks. SEC counsel at trial gave inconsistent statements about whether the Commission would act identically as it did in this case regardless of the source of the speech — a disquieting thought. Counsel did state, however, that the SEC would not hesitate to pursue action against even widely-circulated, mainstream financial publications.[3]

The Fourth Circuit opinion, which allows the First Amendment of the Constitution to be trumped by an overbroad reading of § 10(b), conflicts with opinions that have held that to comply with the First Amendment, any regulation on speech must be narrowly drawn. The opinion directly affects the media and journalists who disseminate information to the public. The court's refusal to independently review, with proper First Amendment deference, the designation of the speech at issue as fraud threatens to chill all speech that could potentially relate to securities.

The court has created the prospect of open-ended government intrusion into an area of speech that has deep historical roots, provides a great deal of public service, and is especially important into to-

---

[3] Pet. Cert. at 10.

day's economic climate. More generally, in reaching its decision the Fourth Circuit has applied reasoning that does not comply with well-established First Amendment case law. This will inevitably lead to confusion among the federal circuits.

The issue of whether § 10(b) is applicable to a non-fiduciary speaker who does not own or trade shares, and what First Amendment safeguards are necessary before this occurs, must be resolved by this Court.

ARGUMENT

I. The decision below applying § 10(b) to a publisher of general financial recommendations with no First Amendment safeguards will impermissibly chill valuable speech regarding financial issues.

Although this case does not involve mainstream financial reporting, Petitioners are nevertheless disinterested publishers of financial information with no direct connection or fiduciary duty to the seller or buyer of securities. Thus, the underlying rationale could be equally applicable to any independent publisher of financial information in the future, casting a chill over reporting on financial matters. If a publisher makes a statement that later proves to be false, or gives general advice that in retrospect was inaccurate, it can be held liable under § 10(b). This is especially problematic because of the inherent volatility of financial markets. Even former Federal Reserve Chairman Alan Greenspan was this year aggressively questioned on Capitol Hill regarding his perceived failure to foresee and prevent the nation's economic problems.[4]

When independent publishers are involved, the First Amendment requires more breathing room. Restrictions on their speech must be drawn as narrowly as possible so that those who wish to publish will not

---

[4] John D. McKinnon and Randall Smith, *Greenspan on Capitol Hot Seat*, THE WALL STREET JOURNAL, April 8, 2010 at A4 ("For Mr. Greenspan, once regarded as an oracle on Capitol Hill, it was a further indication of how the financial crisis has upended reputations.").

be unconstitutionally deterred from speaking. As this Court wrote this term, "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, No. 08-769, 130 S.Ct. ____ (April 20, 2010).

A. Financial reporting has long been a cornerstone of journalism, informing the public and interpreting economic information on its behalf.

Financial reporting is a staple of U.S. news media, valuable for exposing careless financial activity, documenting the state of the nation's economy, prompting reform, and encouraging fiscal responsibility.

Especially in times of economic tumult, the public has turned to financial reporting in publications for information and commentary. During the Great Depression and even prior,[5] *The New York Times* and other publications reported on the status of Wall Street and made predictions about the future of trading and the economy.[6]

---

[5] *See, e.g., Two Important Receiverships Cause Depression*, N.Y. TIMES, January 2, 1894, at 10 ("The stock had sold at 14 on Saturd[a]y, and on Tuesday following the confession of bankruptcy it moved between 13 and 14.").

[6] *See, e.g., Wall St. Cheered By Bankers' Views*, N.Y. TIMES, January 18, 1931, at 41 ("All are cautious on date but two see depression now at bottom, and the three assert securities are underpriced.").

Echoing the historical media reaction to financial crises, in recent years the press has kept the public informed about the country's finances. Notably, there has been a great deal of useful reporting about the contributing factors to the country's recent economic recession.

All of this is possible because reporters and authors of books and periodicals, since the beginning of American journalism, have regularly reported on the activities of financial power players and companies. Unfortunately, this form of valuable transparency could end if courts allow application of § 10(b) to a statement related to sales of securities, from an independent publisher, which is later proved to be incorrect.

The decision below permitted an overly broad reading of the requirements for fraud under § 10(b) of the Securities Exchange Act. Indeed, the Fourth Circuit's reasoning is so broad that it would seem that any media entity that disseminates information about the sale of securities could be punished whenever a court made an *ex post facto* determination that a disinterested publication made a false statement, and that statement led another person to make a securities purchase.

Especially after the economic tumult of the last few years, it is imprudent to open the door to applying § 10(b) to disinterested financial publishers; as such reporting has always played a valuable role in exposing corruption. In fact, it is crucial to encourage more aggressive financial reporting as another measure to hold Wall Street accountable for its actions.

The journalistic landscape of the last decade has been dotted with much valuable financial reporting. For example, in 2007 *Institutional Investor* magazine published a George Polk Award[7]-winning article that predicted impending large-scale economic calamity. Edward Chancellor's article, *Ponzi Nation*, discussed in detail the toll that excessive risk-taking, interconnected investments, subprime mortgages, and underregulation of hedge funds would surely take on the world economy.[8] The Polk committee noted that Chancellor "sounded the alarm months before the financial markets began their roller coaster ride south."[9] The story provided a unique perspective of the behind-the-scenes activities of Wall Street — activities with effects that would eventually cascade to the world economy as a whole.

But this example is far from unique. With regard to the sale of securities, in 2007 *The Wall Street Journal*'s Charles Forelle, James Bandler and Mark Maremont wrote an award-winning (Pulitzer and

---

[7] The George Polk Awards are conferred annually to honor special achievement in journalism. Some of the most respected names in journalism have won George Polk Awards, including Edward R. Murrow, Christiane Amanpour, Carl Bernstein, David Halberstam, Gay Talese, Fred Friendly, I. F. Stone, Morley Safer, Joseph Lelyveld, Anthony Lukas and Walter Cronkite. They were established by Long Island University in 1949 to commemorate Polk, a CBS correspondent murdered the year before while covering the Greek civil war.

[8] Edward Chancellor, *Ponzi Nation*, INSTITUTIONAL INVESTOR, Feb. 7, 2007.

[9] Press Release, Long Island Univ., Long Island University Announces Winners of 2007 George Polk Awards (Feb. 19, 2008), *available at* http://www.brooklyn.liu.edu/polk/press/2007.html.

George Polk prizes) series that sparked federal investigations into shareholder deception.[10] Executives at top corporations engaged in inappropriate self-dealing by buying low and selling high, thanks to a widespread practice of backdating stock option awards. The regulatory investigations covered potential shareholder deception at more than 130 companies — some that were suspected of using backdating to exploit low stock prices after the 9/11 terrorist attacks. *The Wall Street Journal* also won awards in 2001 for a series of stories on misleading and fraudulent practices by Credit Suisse First Boston in promoting initial public offerings.[11] That series resulted in a $100 million federal fine for the company — one of the largest ever.

In the electronic medium, Bloomberg News produced top-notch reporting on the global financial meltdown; indeed, the U.S. House and Senate utilized Bloomberg's articles to prepare for hearings in which legislators questioned top finance executives about the collapse.[12]

---

[10] Katharine Q. Seelye and James Barron, *Wall Street Journal Wins 2 Pulitzer Prizes*, N.Y. TIMES, April 17, 2007 at B8.

[11] Press Release, Long Island Univ., Long Island University Announces Winners of 2001 George Polk Awards (Feb. 20, 2002), *available at* http://www.brooklyn.liu.edu/polk/press/awards.pdf.

[12] Press Release, The New York State Society of CPAs, Journalists Receive Awards from NYSSCPA for Financial Reporting (March 31, 2009), *available at* http://www.nysscpa.org/society/PR/3-31-09releasea.htm.

The calculus changes with the Securities and Exchange Commission's counsel making the chilling pronouncement at trial that the Commission would not hesitate to apply § 10(b) to any financial publication, specifically mentioning *The Wall Street Journal*.[13]

Furthermore, under the Fourth Circuit's reasoning, the fact that publications aim to improve their reputations by disseminating accurate financial information bolsters a claim of fraud under § 10(b).[14] Such reasoning creates a disincentive to freely publish accurate information — an untenable result, as far as the First Amendment is concerned.

The production of informative and timely financial articles is in the public's best interest. Courts should not allow for improper government interference with journalists' pursuit of financial reporting. With such a judicial interpretation of § 10(b) in place, future reporting may be chilled.[15]

---

[13] Pet. Cert. at 10.

[14] *SEC v. Pirate Investor*, 580 F. 3d 233, 247 (4th Cir. 2009) (finding that "reputational gain" that encourages the future purchase of more information is a "connection" to the sale of securities).

[15] *See Daniel v. Dow Jones & Co.*, 520 N.Y.S.2d 334 (N.Y. Civ. Ct. 1987) (granting motion to dismiss suit against news service report that allegedly contained false and misleading information that led the plaintiff to make a bad investment; noting the potential chilling effect finding otherwise would have on papers).

II. Regardless of connection to current affairs, the First Amendment fully protects financial and economic advice.

Setting aside the need to protect financial publications generally, the fact that a publication gives specific advice about securities does not unilaterally exclude it from First Amendment protection. The First Amendment's guarantees "embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). Thus, the First Amendment does not cease to protect speech that may not be specifically germane to current events or politics. The First Amendment "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 101-02.

To the extent that financial reports discuss economic, financial or investment matters generally, there can be no doubt that they are fully protected by the First Amendment. This Court's "cases have never suggested that expression about . . . economic . . . matters . . . is not entitled to full First Amendment protection." *Abood v. Detroit Board of Education*, 431 U.S. 209, 231 (1977).

With regard to financial analyses and reports that value or recommend specific securities, this Court has never held that specificity strips publications of full First Amendment protection. Speech is not deprived of the full protection of the First Amendment merely because it is practical and narrowly useful, rather than being of broad, abstract import.

Moreover, there is no distinction of constitutional significance between "general" and "specific" investment recommendations — that is, for example, between a prediction of the future course of the stock market as opposed to a recommendation to buy stock in one company rather than another. Nor does the fact that readers may act on the basis of specific advice diminish its constitutional protection. *See Thomas v. Collins,* 323 U.S. 516, 536-37 (1945) ("When legislation or its application can confine [speakers] . . . to innocuous and abstract discussion . . . and so becloud even this with doubt, uncertainty and the risk of penalty, freedom of speech for them will be at an end."); *see also Org. for a Better Austin v. Keefe*, 402 U.S. 415, 429 (1971) ("The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.").

Instructively, a Maryland federal court noted in a case involving the very same corporation that produces Petitioner's publications that because the particular publication in that case was offered to the general public and advice given was not specifically tailored to the financial situation of any individual subscriber, it was "subject to the same protection under the First Amendment as any other publication." *Ginsburg v. Agora, Inc.*, 915 F. Supp. 733, 740 (D. Md. 1995) (citing *Lowe v. SEC*, 472 U.S. 181, 210 (1985)); *see also Lubin v. Agora*, 882 A.2d 333 (Md. 2005) (finding that a subpoena of the same company had First Amendment implications).

Nor does the use of hyperbole diminish speech's full First Amendment protection. Financial journalism is often rough and boisterous, and tends to reflect opinion rather than pure fact.

As media expert David L. Nelson noted in a report to the lower court in this case, "almost all media" try to "brag" and "shout" to connect with the audiences, and "[n]ewsletters are no exception." Joint Appendix at 4352. Nelson noted that financial newsletters "use aggressive, usually upbeat or 'Doomsday' rhetoric to attract attention and get subscribers." *Id.* at 4354. In Nelson's trial testimony, he also testified about the exuberant tone that readers have come to expect of newsletter writers. *Id.* at 1171. This is exceedingly common throughout the particular genre. Financial discourse is often prone to heated exchanges and speculation, which most readers take in the aggregate and filter for themselves.

However, financial reports' investment recommendations concerning specific securities and their use of bombastic tone do not detract from their entitlement to full First Amendment protection.[16]

---

[16] Furthermore, the high price and low circulation of information has no bearing on constitutional protection. *Reynolds v. Murphy*, 188 S.W.3d 252, 265 n.17 (Tex. App. 2006) ("News services, whether free to the public, as are television or radio, or more expensive specialized media, such as defendant's computerized database, are instruments for the free flow of all forms of information, and should be treated as unquestionably within the First Amendment's guarantee of freedom of the press.") (citing *Daniel, supra* note 13, at 101-102 ("[T]he cost of the service and the degree of its distribution are not related to the importance of the protection needed for the statement at issue.")).

III. The Fourth Circuit should have conducted an independent appellate review because of the instant case's First Amendment implications.

A. Restrictions on speech are presumptively invalid and any such restriction must be narrowly construed.

This Court has said that the requirement that all viewpoints be treated equally, one of the foundations of the First Amendment, imposes a special responsibility on judges whenever it is claimed that a particular communication is unprotected. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485 (1984).

Although not all speech is of equal First Amendment protection, no cause of action or prosecution can claim "talismanic immunity from constitutional limitations" and all "must be measured by standards that satisfy the First Amendment." *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964). Such constitutional protection does not depend upon "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). After all, "[e]rroneous statement is inevitable in free debate . . . and it must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive," *Sullivan* at 272 (citation omitted).

Indeed, the principle that speech needs wide latitude to flow freely was fiercely supported by the core founders of the United States of America. Thomas Jefferson, no stranger to aggressive scrutiny by the press, once wrote, "[W]ere it left to me to decide

whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." Letter from Thomas Jefferson to Edward Carrington, Delegate to the Continental Congress (Jan. 16, 1787). These beliefs were reflected in the First Amendment to the U.S. Constitution.

Because of the constitutional requirement that First Amendment freedoms be given sufficient breathing space, the government may regulate in the area only with narrow specificity. *See Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940). Any government regulation of speech "susceptible of regular application to protected expression" is impermissible, *Houston v. Hill*, 482 U.S. 451, 467 (1987), and analysis must be done carefully, for "[w]here particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact-finding — inherent in all litigation — will create the danger that the legitimate utterance will be penalized." *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

This Court has in the past rejected the need for close judicial oversight with regard to speech involving economic matters stating, "The dangers of fraud, deception, or overreaching . . . are present in personalized communications but are not replicated in publications that are advertised and sold in an open market." *Lowe*, 472 U.S. at 210.

B. The First Amendment requires a heightened evidentiary showing that a communication, always presumed to be protected, should be stripped of that protection.

All speech at its inception is protected, and when a case requires a court to strip a communication of its First Amendment protection, the evidence in the record must be clear and convincing.[17] *Bose Corp.*, 466 U. S. 485. Appropriate heightened proof requirements have been held to provide sufficient breathing room for protected speech. *See Sullivan*, 376 U. S. at 279-280; *see also Bose*, 466 U. S. at 502. This Court held that with regard to imposing liability on a publisher, a simple negligence standard would constitute an "intolerable burden." *Time, Inc. v Hill*, 385 U.S. 374, 387-89 (1967).

As an additional safeguard responsive to First Amendment concerns, an appellate court may independently review lower courts' findings. *Cf. Bose Corp.*, 466 U. S., at 498-511 (*de novo* appellate review of findings regarding actual malice).

---

[17] The proper standard on these facts is that of "actual malice," as the First Amendment requires a heightened standard. *See Daniel*, 520 N.Y.S.2d at 339 ("The societal right to free and unhampered dissemination of information precludes liability absent proof of knowing falsity or reckless disregard for the truth."); *see also Nat'l Life Ins. Co. v. Phillips Publishing*, 793 F. Supp. 627 (D. Md. 1992) (holding in a defamation suit that "Profitable Investing," a financial newsletter, was entitled to the "actual malice" standard because of First Amendment concerns).

C. This Court should clarify the importance of First Amendment deference and elucidate that restrictions on speech should be narrowly construed.

The use of independent appellate review as an important constitutional safeguard should be reaffirmed by this Court. The Fourth Circuit erred in rejecting Petitioners' argument that the SEC was required to prove the elements of § 10(b) by clear and convincing evidence, before the communication was stripped of its protected status. The Fourth Circuit used the evidentiary standard generally applicable to civil enforcement actions, which requires proof by a "preponderance of the evidence." *SEC v. Pirate Investor*, 580 at 242.

However, this approach cannot be squared with the First Amendment. *Bose* requires any case that implicates the First Amendment to comport with the "clear and convincing" evidentiary standard before the speech is stripped of protection. Because § 10(b) has not been applied to independent publishers of general financial advice,[18] the applicable standards in place do not conform to accepted First Amendment standards. This is likely because in the course of creating the regulation, it was not contemplated that it had the potential to implicate financial speech of non-fiduciaries who neither own nor trade securities. With regard to such speakers, a proper First Amendment analysis would first assume the pro-

---

[18] *See Sup't of Ins. V. Bankers Life & Cas. Co.*, 404 U.S. 6, 8 (1971).

tected status of the speech, and then scale back that protection if necessary.

IV. The application of § 10(b) to publishers violates the First Amendment because it will have substantial effects on newsgathering.

Furthermore, to counter a defense of First Amendment protection, the SEC may not use the standard set forth in *Cohen v. Cowles Media*, as it pertains only to laws that have "incidental" effects on the press's ability to gather and report the news. 501 U.S. 663 (1991). Unlike in *Cohen*, § 10(b)'s impact on newsgathering and news reporting would be more than merely incidental, and thus its application would violate the First Amendment.

In *Cohen*, the plaintiff was a political staffer that leaked information about an opponent to local newspapers on the promise of anonymity. 501 U.S. 663, 665 (1991). On the theory of promissory estoppel, the state courts held the newspapers liable for breach of contract for printing the anonymous name. *Id.* at 666. Prior to that ruling, the defendants argued that the First Amendment prevented the litigation because allowing the judicial enforcement of confidentiality contracts would chill the free speech of newspapers that had legally obtained truthful information, under the existing standards set forth in this Court's prior cases. *Id.* at 668.

Instead, this Court in *Cohen* set forth the new standard that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669.

The Court based its decision on precedent upholding the rule that journalists may not break the law while newsgathering by trespassing, intimidating, or breaking and entering. *Id.* Liability under contract doctrine was generally applicable and thus the First Amendment did not preclude its enforcement.

In contrast with this scenario, the application of § 10(b) of the Securities Exchange Act of 1934 requires additional First Amendment safeguards. Although there was no express exception for publishers in the language of the law, § 10(b) was intended to apply only to true insiders — those with the highest level of power and internal knowledge that influences the sale of securities. *See Reliance Ins. Co. v. Barron's*, 442 F. Supp. 1341, 1353 (S.D.N.Y. 1977) ("The securities laws, and particularly Rule 10b-5, were not developed with the intention of overlapping or reinforcing the law of libel, nor to inhibit the exercise of freedom of the press."); *Cf. Lowe v. SEC*, 472 U.S. 181, 204 (1985) ("Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of non-personalized publishing activities.").

A regulation that controls the action of one who improperly discloses information to sell securities does not in effect apply to all citizens equally, as a contract or trespass law statute does. This is true because an additional layer of constitutional scrutiny is required if a restriction on speech has a substantial effect on First Amendment freedoms. *See Food Lion Inc. v. Capital Cities/ABC*, 194 F.3d 505, 522 (4th Cir. 1999).

As was discussed more fully in section I *supra*, the expansion of § 10(b) has the potential to dramati-

cally chill speech in a field where financial journalists must be free to act as watchdogs without fear of government intervention. Furthermore, the instant case is distinguishable from a traditional *Cohen* case in that the speech itself is the conduct being punished. The First Amendment effects on speech would not be incidental, as the *Cohen* standard sets forth, but direct and overreaching. Government pressure to refrain from making any statements about securities, in case they later prove to be false, is a substantial negative effect on the gathering and dissemination of news.

Although financially-specialized journalists ostensibly have knowledge about securities that is greater than that of the average reader, they do not possess the types of duties that would fairly give rise to the culpability contemplated by § 10(b). Without an additional layer of constitutional scrutiny, its application to non-fiduciary publishers who neither trade nor own stock violates the First Amendment.

CONCLUSION

No form of speech is from its inception automatically placed outside the First Amendment's protections. If permitted to stand, the Fourth Circuit ruling threatens financial reporting in publications throughout the country. The Court must clarify that any removal of speech from the First Amendment's protections must be proved by an absolute minimum of "clear and convincing" evidence of actual malice on appeal. Because of the Fourth Circuit's lack of deference to the First Amendment, which will result in an unconstitutional chilling effect on all publications, *amici* therefore respectfully request that this Court grant Petitioners' petition for certiorari.

Respectfully submitted,

Lucy A. Dalglish
Counsel of Record
Gregg P. Leslie
The Reporters Committee
for Freedom of the Press
1101 Wilson Blvd., Ste. 1100
Arlington, VA 22209-2211
(703) 807-2100
ldalglish@rcfp.org

April 29, 2010